UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CON-WAY FREIGHT INC.,	§	
	§	
Employer	§	
	§	
and	§	**Case No. 16-RC-133896**
	§	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 657,	§	
	§	
Petitioner	§	
	§	

PETITIONER'S ANSWERING BRIEF

G. William Baab
BAAB & DENISON, L.L.P.
6301 Gaston Ave., Suite 550
Dallas, Texas 75214
214.637.0750 Telephone
214.637.0730 Facsimile
gwbaab@baabdenison.com

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CON-WAY FREIGHT INC.,	§	
	§	
Employer	§	
	§	
and	§	**Case No. 16-RC-133896**
	§	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 657,	§	
	§	
Petitioner	§	
	§	

PETITIONER'S ANSWERING BRIEF

To the Honorable Hearing Officer:

Petitioner Teamsters Local Union No. 657 submits this Answering Brief in response to Employer Con-Way Freight's Exceptions and Brief in Support of Exceptions to the Hearing Officer's Report on Objections in the above case, stating as follows:[1]

I. INTRODUCTORY STATEMENT.

An election conducted in this case on September 12, 2014, resulted in a victory for employees voting for union certification. The Tally of Ballots reflected 55 votes for representation by the Union Petitioner, Local 657 and 49 for no union, with four (4) challenged ballots and two (2) void ballots. Con-Way voiced no problems with the election process until it lost the election—no charges or complaints were registered

[1]/ Reference to the Hearing Officer's Report will be by the notation "HO" followed by pagination; reference to Employer Con-Way's Respondent's Brief will be by the notation "EB" followed by pagination; reference to the transcript of hearing will be by the notation "R." followed by pagination and, if necessary, lineation; reference to hearing exhibits is by "Empl. Ex." (only Employer Exhibits are discussed) followed by number and, if applicable, sub letter.

during the union campaign, and no complaints were made to the Board Agent conducting the election during its process. But when Con-Way found it had lost the election, it filed objections which alleged a pervasive atmosphere of threats and fear, misconduct by the Union observer, and failure of the Board Agent and the related process to protect and provide fairness and secrecy in the conduct of the election. The archaic statement that "they threw in everything but the kitchen sink" comes to mind.

After a lengthy hearing on the objections and briefing by the parties, the Hearing Officer issued his Report on Employer Objections. This Report, eighty four (84) pages in length, is an extraordinary document. In more than forty five years of practice with and before the Board, this writer has not encountered a more thorough, careful, detailed, well-reasoned and researched document authored by an individual Region officer or employee. Each objection, each piece of evidence relating to that objection, and all applicable case law, including that cited by Con-Way in its Brief on Objections, is identified, discussed, and analyzed, to the concluding Recommendation that Con-Way's Objections be overruled in their entirety and that Petitioner Local 657 be certified as representative in the election unit. (HO 83). A careful study of the Hearing Officer's Report will only underscore what is said above; the Report is thorough, carefully reasoned and written, and at its conclusion, unassailable. It stands, without need for additional support, as a compelling and controlling documentation of its Conclusion and Recommendation. Nothing which follows is intended to question, contradict, or detract from that Report.

Con-Way's Exceptions and Brief in Support of Exceptions raise little which has not been addressed and resolved by the Hearing Officer's Report. Immediately below,

we respond to parts of Con-Way's Brief which present key legal arguments, central evidentiary considerations, newly cited case law, or Con-Way's request that existing, controlling case law be disregarded or overruled. The last section of this Brief, entitled **Overview of Con-Way's Objections, Record Evidence and Applicable Law,** presents what was Petitioner's Brief on Objections, addressing Con-Way's broader Exceptions with applicable legal authority and citations to record evidence which underpin the Hearing Officer's Report, its Conclusion and ultimate Recommendation.

II. CON-WAY'S CLAIM THAT THE SECRECY AND INTEGRITY OF THE ELECTION WERE FATALLY COMPROMISED.

The first major point raised by Con-Way's Exception and Brief complains that the Region's use of an official NLRB-provided voting booth consisting of a plastic, rectangular–shaped base, along with a three-sided piece of cardboard affixed to the top of the base to form a U shape, failed to provide requisite voting secrecy and related election integrity, and requires that the election be set aside and rerun. (HO 43 ff.; EB 4-23). As the Hearing Officer noted (HO 47), no voter complained of a lack of privacy, secrecy or integrity—in regard to this voting booth or otherwise—during the process of the election. Experienced Con-Way counsel made no meaningful objection to the use of the booth as described device at pre-election hearing, noon voting break, or post-election count. (HO 44-45). Con-Way's subsequent objection(s) to the election based on the subject voting booth were simply manufactured in the aftermath of its election loss.

The Hearing Officer correctly held that Con-Way's objections based in the voting booth and tardily alleged voter concern regarding election privacy, secrecy, and integrity

were controlled by the Board's decision in *Physicians and Surgeons Ambulance Service,* 356 NLRB No. 42 (2010). (HO 48 ff.). He noted that the voting booth used in this case appeared to be that used in that case, that here (as there) there was "no evidence that someone saw how a voter marked his or her ballot," and that there was no reasonable doubt as to the fairness of the election process in that context. (HO 48 ff.).

Con-Way argues again in its Brief in Support of Exceptions that the subject voting booth should be treated as an "improvised' voting device because the Board Agent conducting this election did not affix aluminum legs to the booth, but instead placed it on a table top. (EB 14 ff.). Con-Way then cites case law written in the context of "improvised" voting conditions to argue that the proper legal test is not whether "someone saw how a voter marked his or her ballot" as required by *Physicians and Surgeons Ambulance Service, supra*, but whether some voters had a "reasonable belief" that "someone could have seen how the same employees voted . . . that (the voters) could have believed that their votes had been observed." (EB 19-20, citing *Columbine Cable Co.,* 351 NLRB 1087 (2007) and *Royal Lumber Co.,* 118 NLRB 1015, 1017 (1957).) This argument was presented to the Hearing Officer below; he carefully analyzed and then rejected it. (HO 48 ff.). He discussed applicable facts in the context of case law characterizing what the Board has considered an "improvised" voting booth or device (including the fact that the voting device in *Physicians and Surgeons Ambulance Service was a "table top model")*, analyzed and distinguished the cited cases and others advanced by Con-Way, and found that *Physicians and Surgeons Ambulance Service* applied to this case and controlled its result. (HO 48-53). There is

no need for us to rehash his careful, detailed analysis and conclusion to that effect. We must observe, however, that Con-Way's extended argument on this point reduces to the claim that the use of Board-approved voting equipment is, standing alone, basis for voiding election results. The nonsense inherent in such an argument is obvious. Board-approved voting equipment, fairly characterized as a "booth," meaningfully indistinguishable from that used in *Physicians & Surgeons supra,* was used. Con-Way's parsing words (EB 9-10, 12-14) does not alter that fact.

Any claim by Con-Way that the Board Agent, Union Observer, or anyone "saw how a voter marked his or her ballot,"—or that any voter could reasonably have believed that to be the case—is absolutely unsupported by record evidence. (HO 49-53; *infra* at 25-26). In particular, we address the claim at EB 18 that "the Board Agent clearly could see around the plastic shield and into the plastic base" (referencing Empl. Ex. 8) and that "Union Observer J. J. Martinez could see the forearms and almost to the wrists of employees who were marking their ballot." (referencing Empl. Ex. 8e). Nothing in these staged photographs can fairly, accurately be characterized as evidence that the Board Agent or Union Observer could see how a voter marked his or her ballot inside the voting device (in regard to the perspective presented, there was no testimony concerning a left-handed voter). The Hearing Officer exhaustively examined, analyzed, and rejected the evidentiary proposition that anyone—Board Agent, Union or Company Observer—could "see (or even meaningfully guess) how a voter marked his or her ballot." (HO 49-53). Any claim by any witness to the effect that he or she reasonably believed someone saw how he or she voted is simply manufactured or paranoic.

In its Brief in Support of Exceptions, Con-Way cites three cases not discussed by the Hearing Officer: None of the three provide basis for departure from the Hearing Officer's Report, Conclusion, and Recommendation. *Sewell Plastics,* 241 NLRB 887 (1979) acknowledges prior Board decisions in *Imperial Reed & Rattan Furniture Co.,* 118 NLRB 911 (1957) and *Royal Lumber Company*, 118 NLRB 1015 (1957) (cases discussed and distinguished by the Hearing Officer) but declines to set aside an election where there were serious "secrecy" issues because "the Union was not involved in any misconduct affecting the secrecy of the ballots" and (Company) observers and the Company "did not inform the Board agent of the problem at the election. Indeed, they made no objection . . . until the election was over and the ballots counted." 241 NLRB at 887. *Sewell Plastics* does not support Con-Way's position and related argument. *Durham School Services,* 360 NLRB No. 108 (2014) and *Case Egg & Poultry Co., Inc.,* 293 NLRB 941 (1989) are cited for the proposition that an election must be set aside and rerun on the basis of "merely a doubt as to the complete secrecy of the voting process." EB at 15. The Board's decision in *Durham School Services* cites *Physicians and Surgeons Ambulance Service, supra* in a distinguishable factual context as basis for holding that an employer's objections should be overruled. (360 NLRB No. 108, slip opinion at p. 3, fn. 2). That case cannot fairly be cited for departure from the principles of *Physicians and Surgeons* applied by the Hearing Officer in this case. *Case Egg & Poultry* involved direct evidence "that several voters were in the voting room at the same time and saw how other voters voted" in the context of an employer claim that "the Board Agent failed to supply a voting booth as promised resulting in a compromise of the secrecy of the election." 293 NLRB at 941, fn. 3. These are not our facts or

case. Nothing in the holding of *Case Egg & Poultry* undermines or warrants departure from the principles of the subsequently decided *Physicians and Surgeons Ambulance Service* decision on which the Hearing Officer's findings and rationale rest.

Reduced to its logic, Con-Way's ultimate contention is that the Board's decision in *Physicians and Surgeons Ambulance Service, supra* should be ignored or overruled because of an alleged "reasonable belief" that some voters felt someone could tell how they voted. In the first place, the evidence here does not justify a finding that there was such a "reasonable belief" for reasons exhaustively discussed in detail by the Hearing Officer. (HO 46-53). Otherwise, *Physicians and Surgeons Ambulance Service* remains sensible, fair law which should be applied here. A Board approved voting device was used. No one saw how any voter's ballot was marked except that voter. There were no other legitimate "privacy" or "integrity" issues. No voter who later claimed to believe that someone saw how he voted voiced such a concern at the time. None of these voters expressed discomfort regarding "privacy," "integrity," or any other issue or concern—to the Board Agent or Observers—when or immediately after they voted. Their newly found, after the fact "belief" that someone could have seen how they voted smacks of a manufactured artiface by which Con-Way seeks to escape the results of a fairly conducted election that Con-Way lost. It is precisely such manufactured, purely subjective considerations which the principles of *Physicians and Surgeons Ambulance Service* confront, reject, and dispatch. Nothing in the facts or law applicable to this case justifies departure from *Physicians and Surgeons Ambulance Service* or its principles, as applied by the Hearing Officer. Con-Way's argument to the contrary is meritless.

III. CON-WAY'S CLAIM THAT UNION SUPPORTERS SHOULD BE TREATED AS GENERAL AGENTS OF PETITIONER.

As a second major point of contention, Con-Way continues to insist that a number of election unit employees should be held to be general agents of Petitioner Local 657. (EB 24-32). Presumably, Con-Way continues to pursue this point because it views establishment of general agency status on the part of these Con-Way election unit employees as crucial to its failed claim that Petitioner should be found guilty of allegedly prohibited electioneering, surveillance, and threatening conduct.

The hearing record reflects that from the beginning of the subject organizational campaign Petitioner maintained a regular presence in Laredo, in the persons of Local 657 President Frank Perkins and bilingual Business Representative Paul Cruz. The subject group of election unit employees participated in the campaign only as they requested and obtained blank authorization cards and solicited the signatures of election unit employees on those cards. (R. 40-44). All organizational meetings were held and conducted by Perkins and/or Cruz. There is no claim or evidence that Petitioner Local 657 authorized or solicited the subject group of election unit employees to act in a capacity representing Petitioner, that Petitioner communicated to election unit employees or to Con-Way that this group of employees constituted a union committee or union representative, or that election unit employees in any meaningful respect regarded this group of employees as union representatives. When the group informally met on weekends to discuss the organizational campaign, they did so without Petitioner's direction or assistance. (R. 800-02). In short, the sole factual basis for determining the agency status of this group of employees was their voluntarily seeking

other election unit employees' signatures on authorization cards used to obtain a showing of interest as basis for the subsequent election.

The Hearing Officer carefully analyzed Con-Way's claim that the subject employees were general agents of the Petitioner in the context of record evidence and applicable law, and rejected the claim, concluding that "none of the employees identified above were agents of the Petitioner . . ." (except the Union Observer, J. J. Martinez when he served in that capacity). (HO 6-12). More specifically, the Hearing Officer cited established Board case authority for the position that the mere participation in soliciting authorization card signatures does not establish agency status. *E.g., Cornell Forge Co.,* 339 NLRB 733, 734 (2003); *Corner Furniture Discount Center, Inc.* 339 NLRB 1122-23 (2003). (HO at 10). He distinguished Board authority advanced by Con-Way on the factual bases that the subject election unit employees had not served as an exclusive or even extensive conduit between Petitioner and election unit employees, and there was no meaningful evidence that the larger body of election unit employees recognized or regarded these employees as representatives of the Union. (Distinguishing *Bristol Textile Co.,* 277 NLRB 1637 (1986) and *Pastoor Bros. Co.,* 223 NLRB 451 (1976) on these and other grounds). (HO 9-10).

Finally, the Hearing Officer addressed a series of decisions by Circuit Courts of Appeal, cited by Con-Way as basis for an "alternative" legal theory by which the subject employees could (allegedly) be found general agents of petitioner. (HO at 10-12). Noting that the subject case law has not been adopted by the Board, the Hearing Officer nonetheless analyzed and distinguished it, finally concluding that even if the "test" enunciated by the case law were applied here, no finding of general agency had been

proved. (HO at 11-12 discussing and distinguishing on their facts *NLRB v. L & J Equipment Co.,* 745 F. 2d 224 (3d Cir. 1984); *NLRB v. Georgetown Dress Corp.,* 537 F. 2d 1239 (4th Cir. 1976); *PPG Industries v. NLRB,* 671 F. 2d 817 (4th Cir. 1982).)

The Hearing Officer's Report in these respects needs no explanation or support. It stands on its own as written, and is unimpeachable in its detailed analysis and conclusions. We would add only that this line of case law, even as written by the Courts, makes it clear beyond question that apparent agency authority depends, in the first instance, on some communication of such authority by the principal to third parties. As noted above, the record in this case is absolutely devoid of any evidence—not a word in a document nor line of testimony—suggesting that Petitioner ever communicated to Con-Way or the larger body of election unit employees that the subject group of employees had authority to act or speak for the Petitioner. Con-Way's claim that the subject group of employees were general agents of Petitioner begins and ends on that point.

IV. THE CLAIM OF ELECTIONEERING BY UNION OBSERVER J. J. MARTINEZ.

Con-Way continues to allege prohibited electioneering and election surveillance by those election unit employees whom it has unsuccessfully sought to paint as general agents of Petitioner. (EB 33-49). The Hearing Officer's Report carefully analyzes these allegations as set forth in Con-Way's objections and, in the context of credibility determinations, findings of fact based on credible evidence, and application of applicable Board case law, dispatches them as meritless. (HO 53-64). These parts of the Hearing Officer's Report require no additional discussion.

We do address, however, a singular part of Con-Way's Exceptions and Brief in Support which deal with allegations of misconduct by Union Observer J. J. Martinez. We do so in the context of Martinez' acknowledged status as an agent of Petitioner while serving as Election Observer, and Con-Way's meritless claim that Martinez engaged in no less than "10 separate . . . acts of improper electioneering . . . (which should be) viewed in the aggregate" to void the election. (EB 41, 44).

In the first place, the evidence and applicable law do not justify a finding that Martinez engaged in at least "10 separate acts of (improper) electioneering." The Hearing Officer carefully, in pain-staking detail, analyzed evidence concerning Martinez' conduct and found it to be isolated statements and gestures which applicable Board case decisions have found to be consistent with observers' normal functions or innocuous and "not objectionable" conduct. (HO 64-69). *See, e.g. Milchem, Inc. 170 NLRB* 362 at 363 (1968); ". . . chance, isolated, innocuous comment or inquiry . . . will not necessarily void the election . . . the law does not concern itself with trifles." *U-Haul Co. of Nevada,* 341 NLRB 195, 196 (2004) (thumbs up gestures unaccompanied by other instructions on how to vote not objectionable); *Environmental Maintenance Solutions,* 355 NLRB 340, 342 (2010) ("you guys know what to do already" not objectionable). The Hearing Officer expressly rejected claims by Con-Way that Martinez had told voters how to vote, or that he had engaged in other overtly improper electioneering (HO 70-74), and similarly rejected claims that Martinez had interfered with the fairness of the election by picking up the ballot box, or that Martinez had independently kept a list of who had voted in violation of applicable law. (HO 74-75).

Con-Way's claim that Martinez engaged in at least "10 separate acts of electioneering" is simply not true.

However, *Milchem, supra* prohibits extended conversation between an Observer and election voters (170 NLRB at 363) and there is Board case law which permits aggregation of conversations to justify a finding that a violation of *Milchem* has occurred. *Bio-Medical of Puerto Rico,* 269 NLRB 827, 828-30 (1984). Evidence here—of several brief greetings or ambiguous statements by Martinez lasting a few seconds each, and of a somewhat longer conversation, estimated at "a couple minutes" where Martinez and a voter discussed late afternoon traffic—cannot even colorably be characterized as "extended" even when aggregated. (HO 72-73).

A starting point for this discussion is *Bonanza Aluminum Corp.,* 300 NLRB 584 (1990) where a conversation that lasted "more than two but less than five minutes" was not deemed "extended." The Hearing Officer distinguished *Bio-Medical of Puerto Rico, supra* from our case: there, a union agent deliberately and persistently disregarded the instruction of a Board agent to cease speaking to voters, leading the Board to conclude that the union agent could be characterized as conveying to voters that he had "some connection with, if not control over, the election." 289 NLRB at 830. (HO 73). Three other newly cited cases, not discussed by the Hearing Officer, are similarly distinguishable. In *Volt Technical Corp.,* 176 NLRB 832 (1969) a supervisor "at 5-minute intervals during the election hour" walked up and down a line of waiting voters "talking to them, slapping them on the back, and shaking hands with them." 176 NLRB at 836. This conduct, extending over the entirety of the election, grossly exceeds what is attributed to Martinez. In *Modern Hard Chrome Service Co.,* 187 NLRB 82 (1970) the

subject observer went "beyond a mere hello" repeatedly speaking to voters after being admonished not to do so, and offering "a gratuitous loan" to one voter. Again, this is not Martinez' conduct, or anything like it. Finally, in *Pastoor Bros, supra,* a union observer made a statement to a voter "is your mind made up?" and offered campaign propaganda. The majority's opinion expanding this conduct to objectionable status is based, not on an "aggregation" theory, but on its finding that the conversation was overheard by multiple other voters waiting in line to vote. 223 NLRB 451, 453.

Nothing in the cases Con-Way cites in support of its "aggregation" theory justifies departure from the Hearing Officer's conclusion that Martinez' conduct was not objectionable under *Milchem's* guidelines as subsequently interpreted and applied.

V. CON-WAY'S OBJECTIONS CONCERNING ALLEGED VANDALISM AND PROPERTY DAMAGE.

The Hearing Officer's Report is once more thorough, detailed, and well-reasoned in analyzing and rejecting Con-Way's claims that threatening conduct attributable to Petitioner created an atmosphere of fear and intimidation which required setting aside the election. (HO 14-34). In regard to most of this topic, we rely solely on the Hearing Officer's Report. We address only that aspect of Con-Way's Exceptions and Brief in Support which raise yet again the claim that "vandalism" and "property damage" created a pervasive atmosphere of fear and intimidation which, standing alone, require the election to be set aside. (EB at 63-68). Con-Way's Brief in Support misstates the evidence and authority which apply.

Con-Way claims that substantial, serious damage to Company and employee vehicles was caused by vandalism fairly attributable to union supporters, that

knowledge of this alleged vandalism and related fear was broadly spread among the election unit, and that Board case law requires voiding the election in this factual context. With good reason, the Hearing Officer did not agree. (HO 26-34).

The Hearing Officer's Report catalogues record evidence of alleged vandalism at pages 26-27. Four (4) employees who were openly, adamantly opposed to unionization gave first hand testimony of alleged damage to their personal or Company-assigned vehicles: a scratch on a personal vehicle (Hector Diaz), scratch and antifreeze thrown on a personal vehicle (Sergio Villareal), two incidents of nails in tires of two different personal vehicles (Mario Ramirez), and dents to a personal vehicle and severed air hoses on a Company vehicle (Hector Menchaca). Remaining claims of vandalism were hearsay only, and properly disregarded by the Hearing Officer. (HO 27). According to record testimony, these first hand claims of vandalism were disseminated to an additional nine (9) individuals, two of whom were known union supporters and three of whom were supervisors. The Hearing Officer discussed lack of competent evidence and contradictions in regard to other evidentiary claims. (HO 29-30).

There was not a shred of evidence attributing the alleged vandalism to Petitioner or any union supporter. Equally significant, none of this alleged vandalism was documented: there is not a single word of independent testimony by a second individual who actually witnessed the alleged damage; there is not a single photograph, not a word in a Company report, not a page, line, or word of a police report documenting the claimed vandalism. Petitioner was given no notice of the alleged vandalism. Far from constituting a pervasive atmosphere, the alleged "vandalism" remained a relatively guarded secret, and it is fair to wonder about its constituting Con-

Way's self-manufactured "ace in the hole," to be played if the election resulted in a Union win.

The Hearing Officer correctly concluded that the test to be applied in evaluating the claims of vandalism was that applicable to third party conduct: whether evidence proved the alleged vandalism was "so aggravated as to create a general atmosphere of fear and reprisal rendering a fair election impossible." *Westwood Horizons Hotel,* 270 NLRB 802-803 (1984). *See, e.g., Shepherd Tissue, Inc.* 327 NLRB 98 at 106 (1998). Con-Way implicitly acknowledges this is the proper test to be applied. EB 65. As noted by the Hearing Officer, Board case law enforced by the Courts recognizes that in circumstances similar to those presented here, alleged vandalism will not be treated as basis for setting aside the results of an election. *ATR Wire & Cable Co.,* 267 NLRB 204, 210 (1983), enf'd. 752 F. 2d 201 (6th Cir. 1985); *NLRB v. Bostik Division, USM Corp.,* 517 F. 2d 971, 974 (6th Cir. 1975). The rationale in *Bostik Division, supra* is particularly apt, and is set out in detail below (*see infra* pp. 40-41).

Con-Way has no answer to the cited case law. Instead, it provides isolated quotes from distinguishable case decisions which do not involve facts resembling those applicable here. *Cedars-Sinai Medical Center*, 342 NLRB 596 (2004) involved multiple specific, serious anonymous physical threats, made to company supporters and widely (to some thirty four election unit employees) disseminated. (342 NLRB at 596-98). These facts cannot fairly be compared to the limited, amorphous evidence discussed above. In addition, *Cedars-Sinai* treated the subject conduct as "party misconduct," and thus subject to the lesser test of "having the tendency to interfere with employees' freedom of choice." 342 NLRB at 597, fn. 12. As noted, no "party conduct" has been

proven or is even alleged here. *Shepherd Tissue, Inc., supra,* involved multiple proven physical threats by identified union supporters against company supporters, as well as broadly proven (16 instances) of damage to vehicles of company supporters. 327 NLRB at 105-07. Proof there to support a finding of "a general atmosphere of fear and reprisal" was far broader and more specific that what was proven here. *Picoma Industries, Inc.,* 296 NLRB 498 (1989) involved proven threats by union supporters to "blow up (the company) . . ." and to "beat up" and "blow the (expletive deleted) car up" of a company supporter. 296 NLRB 498-99. These provable, violent threats were made "in the presence of at least 20 employees . . ." Yet again, these are not our facts. Finally, *Teamsters Local 812 (Pepsi Cola Newburgh Bottling Co.*), 304 NLRB 111 (1991) involves strike violence, and does not analyze or apply evidence in the context of the test governing elections. None of these case decisions provide meaningful authority for the proposition that limited, ephemeral evidence concerning "vandalism" should be the basis for setting aside the election conducted here.

VI. CON-WAY'S ARGUMENT THAT "CLOSENESS OF THE ELECTION" AND "CUMULATIVE EVIDENCE" REQUIRE A NEW ELECTION.

Despite having failed to establish evidentiary or legal support sustaining a single objection, Con-Way asks that the Board set aside and re-run the September 12, 2014 election because of its "closeness" and "cumulative evidence" that laboratory conditions were destroyed. EB 68-69. Cited case law (*Cedars-Sinai Medical Center, supra; Hollingsworth Management Service,* 342 NLRB 556 (2004); *Pepsi Cola,* 291 NLRB 578 (1988)) are cases where objections to the subject elections were sustained. Those cases have no application here.

Here, the entirety of Con-Way's Objections have been found without merit, and overruled. Here, no objectionable conduct attributable to a party has been proved. Here, there is no evidence to support a finding that third party conduct has been "so aggravated as to create a general atmosphere of fear and reprisal." The "closeness" of the election here is without legal significance. Are a majority of election unit employees to be disenfranchised in this context? The answer has to be "no!"

VII. OVERVIEW OF CON-WAY'S OBJECTIONS, RECORD EVIDENCE AND APPLICABLE LAW.

All that remains is a review of record evidence and general law applicable to Con-Way's Exceptions which attempt to reinvigorate the entirety of its Objections. What follows is in most respects the Union's Post Hearing Brief:

Objection 1. Claim of Impermissible Electioneering.

The record establishes that Con-Way's claims of "impermissible electioneering" are grounded solely in alleged conduct by election unit employees identified as active Union supporters (Juan Narron, and A. Cruz) and one election unit employee not shown to be involved (Heriberto Martinez). As noted above, the identified individuals are not "agents" of the Union for purposes of analyzing their alleged conduct, but must instead be treated as "third parties." *See* discussion below. (Allegations concerning Union election Observer Juan ("J.J.") Martinez are discussed below in the context of specific Objections addressing him.). There is no evidence of "electioneering by a party" here.

In *Milchem, Inc.,* 170 NLRB 362 (1968) the Board held that "sustained conversation" with voters waiting to cast their ballots requires that an election be set aside, regardless of the content of the conversation. However, *Milchem* and

subsequent case law also makes it clear that "chance, isolated, innocuous comment or inquiry" is not comprehended by *Milchem's* "strict rule." *Milchem, supra* at 363; *see also, e.g., Sawyer Lumber Co.,* 326 NLRB 1331, 1332-33 (1998). More importantly for our purposes here, *Milchem's* "strict rule" does not apply to claims of electioneering by non-party ("third party") employees. Here, the standard is "whether the conduct at issue so substantially impaired the employees' exercise of free choice so as to require the election to be set aside." *Hollingsworth Management Service,* 342 NLRB 556 at 558 (2004) quoting from *Rheem Mfg. Co.,* 309 NLRB 459, 463 (1992). We treat the specific evidence regarding this Objection under these legal principles, citing more specific case law where applicable.

The Fact That the Break Room and Adjacent Office Area Were Not Made "No Electioneering" Zones.

It is significant that the break room and office areas immediately adjacent to the training room, where the election was conducted, were not declared or posted as "no electioneering" zones. (R. 816-19). In such a case, the Board considers only "conduct occurring at or near the polls" in determining whether objectionable conduct has occurred. *See Bally's Park Place, Inc.*, 265 NLRB 703 (1982). "Even when electioneering occurs 'at or near the Polls,' the Board considers a number of additional factors to determine whether the conduct is objectionable, such as the nature and extent of the alleged electioneering, whether it was conducted by a party to the election or by employees, whether a no-electioneering area had been designated and conduct occurred within the area, and whether conduct occurred or continued contrary to the

instructions of the Board Agent." *Bally's Park Place, Inc. supra* at 703, fn. 5, citing *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118, 1119 (1982).

Jorge Ordonez' Claim Regarding Heriberto Martinez.

Con-Way witness Jorge Ordonez claimed that sometime after 9 a.m. on September 12, as he walked through the break room toward the polling area in the training room, fellow employee Heriberto Martinez approached him (Ordonez) and said, in Spanish *"ahi te encargo,"* a phrase alternatively interpreted (by the Board-provided interpreter, as "you know what you have to do" (R. 308) or "do what you have to do." (R. 122). Ordonez said the statement meant to him "that I support them and vote yes for the Union." (R. 308). Heriberto Martinez denied being in the break room, seeing and/or speaking to Ordonez, at that time. (R. 790-91). He (Heriberto Martinez) testified without contradiction that while he had earlier that morning been in the break room, he left to check in at the dispatch office at or before 8:25 a.m., then left to prepare his truck for his morning route, and had left the yard on his route by 8:50 (R. 789-91), well before Ordonez' self-stated "9 a.m." arrival at the facility and his subsequent trip through the break room to vote. (R. 305, 308). Simply put, Ordonez' claim that Heriberto Martinez spoke to him in the break room, before he voted, is not credible. In any event, the attributed statement was not "sustained conversation," but rather the sort of brief remark which does not fall within *Milchem's* prohibition. Finally, Heriberto Martinez was not a party (not a Union agent), and the remark, even if it had been made, was facially neutral and cannot conceivably be characterized as "so substantially impairing (Ordonez') exercise of free choice as to require the election to be set aside." *Hollingsworth Management Service Co., supra; Rheem Mfg. Co, supra.*

A. Cruz/*Francisco Lopez.*

Con-Way witnesses Tobirio Figueroa and Danny Delgado testified that Election unit employee/Union supporter Antonio Cruz assisted injured employee Francisco Lopez (Lopez was "on crutches") into the building and to the area of the polls, stating (Cruz) as they briefly walked through a Company office area "Let's go. Let's go. I'm helping you so you can go vote." (Figueroa; R. 509-12) or (Delgado) "Let's vote. The more of us there are to vote, the better. Let's vote for the Union." (R. 688-89). There was no evidence that Cruz otherwise assisted or spoke to Lopez once the two entered the break room, adjoining the voting area in the training room. (R. 512; 689-90).

We find no case law supporting the proposition that merely assisting an injured voter to the polling area constitutes prohibited electioneering. Otherwise, the alleged comments by A. Cruz must be treated in the context of law discussed above. In the first place, Delgado's testimony (he had just been promoted to a supervisory position before he testified; *see* R. 682) is nonsensical and not credible. He admitted that Figueroa was located right next to him, and Figueroa's testimony says nothing about "let's vote for the union . . . the more of us the better . . ." (*See* especially R. 512: "Q: Anything else? A: No, sir. That was it."). Figueroa's testimony makes little more sense in that Cruz would have no need to explain what they were doing to Lopez, who obviously had come to the facility for the purpose of voting. More likely, Cruz was explaining to those in the office area why he and Lopez were passing through. But regardless, Cruz' brief comments, even if addressed to Lopez, do not constitute "sustained conversation" or conduct which "so substantially impaired Lopez' free choice" as to require the election to be set aside. Certainly, Cruz' brief comments do not rise to the level of objectionable conduct under

the criteria enunciated in *Bally's Park Place* and *Boston Insulated Wire,* discussed above.

General.

Con-Way witness Alejandro Ura testified that another employee, Alfredo Garcia, told him in the late afternoon of September 12 that "some people who were pro-union" were "in the break room and outside of the break room . . . using the blue tooth . . . waiting there to accompany them (apparently prospective voters) or to like escort them to go in to vote or—I don't know." (R. 626). Ura acknowledged he had no direct contact with these "people who were pro-union" and could not testify to what they had said or done other than that he saw people "in the break room." (R. 629-30). No possible violation is implicated.

Juan Narron/Cesar Ortiz/Alleged Breakroom Statement.

Conway witness Jesus Garcia testified that about 8:45 a.m. on September 12 he saw Juan Narron speak to new driver Cesar Ortiz "outside the building" and that later in the day ("about 6:00 in the afternoon"), he (J. Garcia) approached Cesar Ortiz and "asked him if they were asking him who he voted for." (R. 675-76). After Con-Way counsel recast Garcia's testimony to reflect that Garcia asked "Ortiz if Narron was discussing "who to vote for" (R. 676-77), Garcia gave conflicting, self-contradictory answers: "I don't remember." (R. 680. L. 2). "No." (R. 680, l. 5). "Yes." (R. 680, l. 8). Narron denied having told Cesar Ortiz how to vote. (R. 711). No violation can be implicated here. Even if Narron had made the statement, his talking to Ortiz was not party conduct (and therefore not subject to *Milchem's* strict prohibition), could not have "so substantially impaired" Ortiz' free choice as Ortiz voted, and was in any event not

conduct within a prohibited area. *See U-Haul of Nevada,* 341 NLRB 195, 196 (2004); *Harold W. Moore & Son,* 173 NLRB 1258 (1968) (conduct outside the building, 30 feet from entrance, with voting area 30 feet inside entrance, not objectionable electioneering).

Con-Way witness Delgado testified that after Delgado voted on September 12, he saw Juan Narron suddenly stand up, point to the yes box on the sample ballot in an election notice in the break room, and state in Spanish "This is what you have to vote for, where you have to vote for." (R. 694-695). Narron denied having engaged in this conduct. (R. 712-13). As noted above, Delgado had recently before giving this testimony been promoted to supervisor. (R. 682). His descriptive testimony is inherently nonsensical: there is no human, logical explanation as to why Narron would suddenly do what he did. But most important, Delgado could not identify any other prospective voter as being in the break room or hearing what he claimed Narron said. (R. 703-04). Simply put, the conduct, even if occurred, was not electioneering.

Summary:

For the reasons discussed, Objection 1 is not proved, is without merit, and must be overruled.

Objection 2: Claim of Prohibited Surveillance.

There is Board case law supporting the proposition that surveillance of election voters by **Union party representatives** may be the basis for setting aside an election. *Nathan Katz Realty v. National Labor Relations Board*, 251 F. 3d 981 (D.C. Cir. 2001). We find no such clear precedent as to election unit employees who are merely Union supporters, and not Union agents. And the mere presence of a group of Union

supporters in an unposted area adjacent to the voting area is not, standing alone, conduct which will be regarded as impairing the free choice of voters so as to pose objectionable conduct. *Sewanee Coal Operators' Association*, 146 NLRB 1145 at 1147 (1964). Finally, a Union's proven photographing of employees opposed to the Union during the election process might, under certain circumstances, be objectionable conduct. *Randall Warehouses of Arizona, Inc. (Randall II),* 347 NLRB 591 (2006). For reasons which follow, prohibited, objectionable conduct has not been proved here.

The Gathering of Union Supporters at the Back of the Break Room.

At times during the morning election session, Union supporters Francisco Maldonado, Juan Narron, Javier Moreno, Antonio Cerna, Felipe Perez, and Julio Ortega sat in the break room, at a table farthest away from the door of the training room which was posted as the election polling area. (R. 307-08; 545-47). Con-Way apparently contends that their sitting there, and occasionally watching as voters went to the training room to vote, constitutes objectionable "surveillance." As noted above, we find no case law which so interprets and applies the prohibition against "surveillance by a **party**" to non-party employees who vote in the election. We also note that long ago, the Board held that the mere presence of a group (in fact, a crowd) near the voting area was not objectionable conduct. *Sewanee Coal Operators' Association, supra.* These employees, as they sat in the back of the break room, did not interact with other employees as they (the others) voted. Their presence cannot reasonably be found to run afoul of the general rule governing third-party conduct, which requires a showing of "conduct which so substantially impaired employees' exercise of free choice as to require the election to be set aside." *Hollingsworth Management, supra; Rheem Mfg.,*

supra. Indeed, Con-Way's claim in this respect is shown to be ridiculous: it seemingly sponsors as appropriate the conduct of Company supporter Hector Diaz, who sat to eat his lunch in the break room at a location closest to the training room door, where he could most easily "see in" when the door opened and closed. (R. 452 ff.; Con-Way Ex. 7a).

The Alleged Photographing Attributed to Francisco Maldonado and Javier Moreno.

Company witness Hector Diaz testified that Union supporters Francisco Maldonado and Javier Moreno gave him "the impression" they were photographing employees in the break room during the hours of "8:15-8:20" to "8:45" on the election morning of September 12, 2014. (R. 454-59). Diaz claimed Maldonado and Moreno went to the front of the break room (at the end where the training room door was located) and, moving back and forth with their cell phones in their front jacket pockets, faced towards employees in the break room. (R. 454-58). Diaz could not say that he saw Maldonado and Moreno operate their cell phones (R. 457-59), and could not say that any employee came to vote or entered the training room during the stated time period. "There was other employees eating at that time . . . didn't see anyone going in there (to vote), not at that time." (R. 459). Maldonado and Moreno denied photographing or filming employees in the break room, and there was no other evidence that they did so. (R. 123-24; 140-42).

Summary:

There is no credible proof that Union supporters engaged in prohibited surveillance during the September 12, 2014 election. Objection 2 must be overruled.

Objection 3. Claim That the Board Agent Failed to Maintain the Secrecy, Integrity, Sanctity, and Gravitas of the Election.

"In order to set aside an election based on Board agent misconduct, there must be evidence that 'raises a reasonable doubt as to the fairness and validity of the election.'" *Physicians & Surgeons Ambulance Service, Inc.,* 356 NLRB No. 2 (2010), citing *Polymers, Inc.,* 174 NLRB 282 (1969), enf'd 414 F. 2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). Setting aside for the moment Con-Way's claim concerning the voting shield used and related voter privacy, there can be no colorable claim that the stated legal standard has been met.

Con-Way effectively procured and ratified all remaining logistical circumstances and conditions governing the September 12, 2014 election. Con-Way chose the training room for the site of the election, and its experienced attorneys made no claim, as they came and went at least four (4) times during the conduct of the election, that the break room or adjacent office area should have been declared and posted as a no-electioneering zone. (R. 721-29; 819). No Company representative, during the entirety of the process, raised an issue concerning Observer conduct or the conduct of Board Agent Steve Martinez. (R. 282-86; 728-29). There is no evidence that before, during or after the election process, any Con-Way representative made a request that Board Agent Steve Martinez act to address and control electioneering, surveillance, observer conduct, or any other condition or circumstance.

Board law governing a claim that a Board agent failed to protect the secrecy of voter balloting was articulated in *Physicians & Surgeons Ambulance Service, supra.* There, the Board panel majority of then-Chairman Liebman and then-Member Pearce

wrote in relevant part: "Where, as here, the alleged misconduct is the Board agent's failure to ensure the secrecy of voter balloting, the Board will not set aside the election under *Polymer's* standard **absent actual evidence that someone witnessed how a voter marked his or her ballot.**" (Emphasis added.) *Id. p. 2 of slip opinion,* citing *Avante At Boca Raton,* 323 NLRB 555, 558 (1997) and *St. Vincent Hospital,* 344 NLRB 586, 587 (2005).

Multiple Con-Way witnesses claimed discomfort with voter privacy, alleging that they believed Observers and the Board Agent could "see how (they) voted" based on upper arm movements behind the Board's voting shield. (R. 471-72; 506-08; 548; 598-99; 652-55; 672-73; 691-93). The "Yes" and "No" boxes on the ballot (*see* Jt. Ex. 1) are some 3 ½ inches apart, from center to center. As Con-Way witnesses demonstrated how marking the ballot behind the shield could have shown how they voted, they repeatedly moved their arms and shoulders from side to side over a distance of 12 to 15 inches. The subject shield was one repeatedly used by the Board in its election process. Each Con-Way witness eventually acknowledged that neither the Observers nor Board agent could have seen their (the voters') hands, or the ballot they marked, as each voted. (R.474; 506; 569; 606; 655-58; 680; 692).

Summary:

We submit that there is no credible evidence that the Observers or Board Agent could have seen or known how any voter voted, from observing the process of those voters' marking their respective ballots. There is no credible evidence that anyone "witnessed how a voter marked his or her ballot."

There is no factual or legal basis for sustaining this Objection; it must be overruled.

Objection 4: Claim of Observer Misconduct.

The cited Objection claims that Union Observer J. J. Martinez made improper gestures and statements to voters, improperly picked up, handled and shook the ballot box, and openly reviewed and counted the names of eligible employees who had not voted.

In regard to conduct by a party Observer acting in that capacity, the Observer is an agent of the party, and therefore subject to the *Milchem* rule discussed above. Observer conduct is often treated according to the *Boston Insulated Wire* considerations identified above, with focus on the nature and extent of the conduct, and whether it occurred or continued contrary to the express directions of the Board agent involved. *Brinks Incorporated,* 331 NLRB 46 (2000). "Social pleasantries" do not equate to objectionable electioneering. *Modern Hard Chrome Service Co.,* 187 NLRB 82 (1980). *Milchem's* prohibition does not extend to "chance, isolated, innocuous comment or inquiry." *Milchem, supra* at *363; Sawyer Lumber Co.,* 326 NLRB 1331, 1332-33 (1998). Multiple brief conversations will ordinarily not be "cumulated" or "aggregated" into prolonged or sustained electioneering. *Dubovsky and Sons, Inc.,* 324 NLRB 1068 at fn. 6 (1997), citing *NLRB v. Vista Hill Foundation,* 639 F. 2d 479 (9th Cir. 1980) enf'd 239 NLRB 667 (1978). Ambiguous gestures, (more specifically "thumbs up") will not be translated into objectionable conduct when not linked with instruction to cast a particular vote (for or against the Union). *U-Haul Co. of Nevada,* 356 NLRB 195, 196 (2004). Finally, an election Observer's mere, periodic reference to an official election list of

eligible voters' names is permissible, since the list is in the joint custody of election observers, and it is their duty to maintain it. *N.L.R.B. v. WFMT,* 997 F. 2d 269, 277 (7th Cir. 1993). Unless a separate, independent written record is kept, Board case law prohibiting the keeping of a list, separate and independent from the official list, is not implicated. *Piggly-Wiggly #011*, 168 NLRB 792, 793 (1967).

Morning session Con-Way Observer Isabel Deltoro claimed that Union Observer J. J. Martinez had told voters Juan Salinas, Martin Lieja, and others she could not identify "Here we are. This is how we do it." and "Hey, call those outside so they can come and vote." (R. 381-82). Salinas and Lieja adamantly denied that J.J. Martinez had made such comments. (R. 762-64; 771-71). J. J. Martinez denied making such comments (R. 270-72) but acknowledged that he might have remarked to a voter or voters early in the morning session to the effect that "we were waiting on you" because it took voters awhile to start coming in. (R. 273). Deltoro claimed that Martinez gave a "thumbs up" gesture to several voters (R. 383), a claim Martinez adamantly denied. (R. 273). Deltoro alleged that J.J. Martinez had "picked up" and "shook" the voting ballot box (R. 386), another claim which J. J. Martinez denied, testifying that he touched the ballot box only in signing over the tape placed on the box by Board agent Steve Martinez after the morning voting session. (R 276-77, 278-79, 284-85). On cross examination by the Hearing Officer, Deltoro admitted no ballots were dislodged from the ballot box when (she alleged) Martinez "picked it up" and "shook" it. (R. 388). J. J. Martinez acknowledged that he periodically visually checked how many voters had voted, in the process of his joint administration (with Ms. Deltoro) of the voting list (R.

274-75), but denied keeping any independent notes or records. (R. 275, 294). There was no evidence that he kept such an independent record.

Con-Way witness Hector Menchaca claimed that as he was at the Observer's table, prior to voting, J. J. Martinez told him in Spanish: "You know what you have to do," meaning to Menchaca that he was to mark his ballot for the Union. (R. 549-50). Martinez denied making such a statement (R. 272, ll. 1-3) and Company Observer Deltoro did not corroborate Menchaca's claim that Martinez made such a statement. (R. 380 ff.).

Con-Way's evening session Observer, Manual Ramiriz, claimed that J. J. Martinez asked him (Ramirez) when line haul driver Luis Rosales "would come in" and "hugged" Rosalez when he appeared to vote. (R. 595-97). J. J. Martinez testified that his conversation with Ramirez was about line drivers in general, and it does not appear that any voters were present when the conversation occurred. (R.595 ff.; 717-18). Both Martinez and Rosales denied that Martinez "hugged" Rosales when the latter appeared to vote, and Rosales confirmed that he had no contact with Martinez that day prior to his (Rosales') voting. (R. 717, 781, 783). Ramirez also claimed that J. J. Martinez had a brief conversation with voter Francisco Alvarez about "the traffic outside" but acknowledged that the conversation ceased when Board Agent Steve Martinez instructed Alvarez "to vote and step out of the room." (R. 597, 601).

Summary:

In its sum, the above evidence demonstrates only that Union Observer J. J. Martinez had "isolated, innocuous" conversations with voters, in the nature of "social pleasantries" which are not prohibited by the *Milchem* rule. There is no evidence that

any "thumbs up" gestures, if made, were tied to instruction to vote a particular way. Credible evidence reflects that Martinez did not "pick up" or "shake" the ballot box. If he had, there is no evidence that voters were present, that doing so dislodged or changed any ballots, or that the election was affected in any way. There is no evidence that Union Observer Martinez maintained a separate, independent record or list of voters or how they voted. There is no evidence that any voter saw Martinez refer to the official list except to check off the voter's name, and no evidence that any voter believed Martinez was "keeping track" of votes in the process. Finally, it is significant that neither Company Observer, despite being instructed by Company counsel and the Board Agent concerning their responsibilities, complained to the Board Agent or anyone else about J. J. Martinez' purported conduct. *U-Haul of Nevada, supra at 196.* Applicable case law, cited and discussed above, requires that Objection 4 be overruled.

Objections 5 and 6: Claim that the Union Observer was Impermissibly "Keeping Track" of Which Employees Had Voted and How They Voted.

These Objections are discussed and basically resolved as part of the analysis above concerning Objection 4. Board law has historically prohibited an Observer's keeping a **written** list or record of who has voted (and how), separate and independent of the official list used to check in voters during the election process. *Piggly-Wiggly #011,* 168 NLRB 792, 793 (1967); *International Stamping Co., Inc.,* 97 NLRB 921 (1951). Related case law noted that the concern was that voters could be restrained or coerced if they through their names (and votes) were being recorded in the election process. *A. D. Julliard and Co.,* 110 NLRB 2197, 2199 (1954).

Here, applicable record evidence proves that Union Observer J. J. Martinez did not make or keep such a separate written list or record. Rather, he periodically reviewed the official list to see how many potential voters had not voted—a typical, predictable part of the process as Observers and the administering Board Agent assess how many employees remain to vote. Of equal significance, there is no evidence that so much as a single voter believed that Martinez was "keeping track" on a written list or record, or otherwise. Finally, there is no evidence that the supposed belief that Union Observer Martinez was "keeping track" influenced the vote of any employee. *N.L.R.B. v. WFMT, supra* at 276-77.

Summary:

Objections 5 and 6 are without merit, and must be overruled.

Objection 7: Claim of Promise of Monetary Rewards or Benefits.

Withdrawn. (R. 707).

Objection 8: Claim of Threat of Job Loss, Physical Harm, or Other Reprisal.

We have noted above that in this context, a distinction must be drawn between conduct attributable to Union officers, employees, representatives, and agents on the one hand, and conduct involving election unit employees who are Union supporters (often characterized as "third-parties") on the other. *See, e.g. The Lamar Company*, 340 NLRB 979, 980 (2003); *Corner Furniture Discount Center, supra at 1123; Cal-West Periodicals, Inc.,* 330 NLRB 599, 600 (2000). Union adherents ordinarily are Union agents when they act in the process of soliciting authorization cards. *Corner Furniture Discount Center, supra* at 1122, fn. 2; *Davlan Engineering,* 283 NLRB 803, 804 (1987). Otherwise, the fact that an employee solicited cards, actively participated in organizing,

or was otherwise visible in a Union campaign does not establish agency status. *Corner Furniture Discount Center, supra.* "The Board will set aside an election on the basis of third-party threats only if the conduct is so aggravated that it creates a general atmosphere of fear and reprisal rendering a free election impossible." *The Lamar Company, supra* at 980; *Cal-West Periodicals, supra* at 600. Third-party threats are to be analyzed as to seriousness on the basis of certain considerations: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated at or near the time of the election. *The Lamar Company, supra* at 980, citing *Westwood Horizons Hotel,* 270 NLRB 802, 803 (1984). Employees' subjective feelings about or reactions to alleged conduct is irrelevant to the question of whether or not there was, in fact, objectionable conduct. Rather, the test is based on an objective standard. *Corner Furniture Discount Center, supra* at 1123; *Picoma Industries, Inc., 296* NLRB 498, 499 (1989). Finally, employees' discomfort with the tensions and difficult feelings that come with an organizational election campaign are similarly not probative: "A certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election." *Cal-West Periodicals, supra* at 600, quoting from *Nabisco, Inc. v. N.L.R.B.,* 738 F. 2d 955, 957 (8th Cir. 1984). Against this legal backdrop, we analyze and discuss the incidents which, according to Con-Way and its supporters, present objectionable "threats."

Jose Serna/Julio Cruz.

Union supporter (he admittedly signed an authorization card) Jose Serna was apparently accused by fellow employee Julio Cruz of filling out an authorization card for and signing Julio Cruz' name on it. (R. 221 ff.). In this context, the two men had a verbal confrontation as Serna worked at the Company facility. Record testimony reflects that the two argued, and that Serna told Cruz this was "a very serious accusation" but does not provide any evidence of a threat by Serna. (R. 221-25).

Mitsui/Jorge Ordonez.

Company supporter Jorge Ordonez testified that "fifteen days to one month before the election" an otherwise unidentified employee named "Mitsui" asked him (Ordonez) why he didn't join the Union, and when Ordonez said he "wasn't interested" Mitsui said "one day he was going to be steward of the company . . . if I had a problem and he was the representative of the Union . . . I was going to have to resolve things the best way that I could and that I was going to be screwed." (R. 297). There was no independent evidence that Mitsui was an active Union supporter, or that he sought Ordonez' signature on an authorization card in this exchange. (R. 296-97). Union President Perkins testified that he did not know Mitsui, and that Union stewards would be first appointed and then elected by their follow employees, so that Mitsui had no basis for saying he would be a Union steward. (R. 730-31).

Felipe Perez and Javier Moreno/Jorge Ordonez.

Ordonez next testified that "two weeks before the election" Union supporters Felipe Perez and Javier Moreno came to his (Ordonez') house and "said we want to talk with you and we want to talk to you about why you don't want to join the Union." (R.

298). Ordonez' version of this conversation reflects that he was uncomfortable with what the two said and with their being at his house (R. 299-300) but is absolutely devoid of any claim by Ordonez that either Perez or Moreno made a threatening statement or gesture during the conversation. (R. 297-301).

Francisco Maldonado/Jorge Ordonez.

Ordonez testified that "two days before the election" Francisco Maldonado, in the presence of Felipe Perez and Javier Moreno, "asked me if I was going to sign the form (an authorization card) . . ." and that then in the Con-Way parking lot Maldonado (in his truck) took out a form and asked him (Ordonez) to sign the authorization: "Sign it right now. Sign it now." (R. 303). Ordonez testified that when he said "I don't want to sign it, I don't want to," Maldonado said "then, fuck you" but that Maldonado also told him "look, things are going to change. We're going to be better off with the Union. But I told him no and then he said look, it's now or no; no more, never." (R. 303). Again, Ordonez' account of the conversation is absolutely devoid of any threat. (R. 303-05).

Javier Moreno and Francisco Maldonado/Hector Menchaca.

"About a month" before the election, Javier Moreno and Francisco Maldonado purportedly talked separately to Con-Way supporter Hector Menchaca about signing a Union authorization card. Menchaca's account of these conversations is absolutely devoid of any claim that either Moreno or Maldonado threatened him in the process. (R. 524-26).

Antonio Cruz and Francisco Maldonado/Hector Menchaca.

Following an initial conversation with Menchaca in the Con-Way parking lot, Maldonado and Cruz followed Menchaca to his house, to continue discussing

Menchaca's signing an authorization card. (R. 529). Cruz (whom Menchaca characterized as a "friend") testified that Menchaca had invited them to come to his home to continue the conversation. (R. 73; 568). According to Menchaca, he felt "harassed" at his home when Maldonado and Cruz continued to urge him to sign an authorization card, but again his description of the conversation contains no claim that any threat was made by either (Maldonado or Cruz) in the process. (R. 528-29).

Javier Moreno and Antonio Cruz/Hector Menchaca.

The following day, Con-Way terminal manager Ted Garcia held a meeting where he warned against employees "bother(ing)" other employees about signing authorization cards. (R. 530 ff.). Menchaca testified that after the meeting, Javier Moreno and Antonio Cruz blamed him (Menchaca) for accusing them of 'bothering" him about an authorization card. (R. 530-32). Yet again, Menchaca's account of his conversation(s) with Moreno and Cruz contains no claim of threat by either. (R. 530-32).

Felipe Perez/Alejandro Ura.

Con-Way supporter Alejandro Ura testified that he received a call from Felipe Perez, who was a friend, where Perez "was letting me know to be very careful" because Ura had been telling employees that the Company "could close" because of the Union organizing campaign. (R. 619-20; *see also* R. 161-62; 749-52). Although Perez acknowledged that he was seeking to "protect" Ura, he also explained that he meant only that we "shouldn't be saying those rumors . . . shouldn't be saying things we didn't know about" in the context that material from the National Labor Relations Board which Perez believed advised 'you couldn't say lies . . ." (R. 161-62; 749-50). Ura testified that during this conversation there was talk of "a list being made, and that my name was

on the list, and that I could have problems in the future." (R. 618). In regard to the "list," Perez testified that the list was maintained only to record those who had and had not signed authorization cards (R. 751-55), and told the Hearing Officer "I only told him that there were this many people who were in favor . . . I don't remember anything more. If he asked something more about the list, I don't remember." (R. 755). Javier Moreno confirmed that the "list" was not used to target union opponents. (R. 800-03). Perez absolutely denied threatening Ura during this conversation (R. 750), and there is no evidence that Ura was in fact ever targeted or otherwise threatened in any respect.

Mitsui, A. Cruz, and Jose Serna/Ura.

Ura also claimed that he felt threatened by "Mitsui" and Antonio Cruz when the two, separately, asked him (Ura) for information from his wife about "what was happening" with the Company in response to the Union campaign. (Ura's wife worked in the Con-Way office). (R. 621-22). Ura's accounts of these separate conversations contain no evidence that either Mitsui or Cruz made a threat towards Ura or his wife in communicating the request for information. (R. 621-22). Ura also testified that Jose Serna mentioned his (Ura's) wife in talking to Ura about supporting the Union, but this account contains no claim that Serna threatened Ura in any respect. (R. 623-25).

Julio Ortega and Geraldo Victoria/Juan Gutierrez.

Company supporter Juan Gutierrez testified that he was approached by Julio Ortega and an employee named Geraldo Victoria to sign an authorization card about a week and a half before the election. (R. 642-43). Gutierrez' account of the exchange with these two individuals is completely devoid of any suggestion that they threatened him in any way. (R. 642-43).

Felipe Erispe/Juan Gutierrez.

Gutierrez also testified that in about the same time frame, he had a conversation with an employee named Felipe Erispe, then a Con-Way line driver, at the Con-Way facility in San Antonio. (R. 643 ff.). There is no claim by Gutierrez that Erispe asked him to sign an authorization card, during that conversation or otherwise. According to Gutierrez' first (R. 644-45) and third (R. 659-60) accounts of the conversation, Erispe told him that the Union would not admit to membership those who voted against the Union in the election, and that if the Union won the election, it would decide whether or not supervisors were permitted to stay with Con-Way and where the supervisors would work. (R. 644-45; 659-60). After Gutierrez completed his first version of the conversation ("That was the end of the conversation . . ." R. 645, ll. 7-8) Con-Way counsel led him to state that he "understood . . . that if the Union came in, automatically, none of us were going to be at Con-Way Freight." (R. 646, ll. 14-16.). As noted, this claim was absent when Gutierrez first recounted the conversation with Erispe, and when he again recounted the conversation on cross-examination. It is clear that Gutierrez remained a Con-Way supporter. (R. 646 ff.).

Unattributed Rumors.

Multiple Con-Way witnesses testified to "rumors" that Union supporters had said that those who voted against the Union in the election would lose their jobs or be fired if "the Union came in" (won the election). (R.437-38; 490; 533-34; 646-47). None of these "rumors" were directly attached to identifiable Union supporters in the context of their seeking signatures on authorization cards, or otherwise. Only the allegation directed by Juan Gutierrez at Felipe Erispe identified an individual allegedly making

such a claim, and as noted, the credibility of Gutierrez' claim that Erispe made such a statement is fatally infected by Gutierrez' twice omitting such a claim in describing the conversation, and including the claim only when Con-Way counsel suggested that he should. (Compare R. 644-45 and 659-60 with R. 646-47).

Summary:

No alleged threatening conduct is attributed to Union officers, employees, or representatives. There is no evidence or suggestion that the Union encouraged or ratified the alleged conduct. Only a limited number of the cited incidents involved Union supporters' soliciting authorization cards. Con-Way's evidence concerning those (**F. Perez and J. Moreno/J. Ordonez; F. Maldonado/Ordonez; A. Cruz and F. Maldonado/H. Menchaca; J. Ortega and G. Victoria/J. Gutierrez)** contain no allegation of threatening statements and or other conduct which could reasonably be characterized as threatening. Only three remaining incidents could conceivably be characterized as alleging threatening statements; Felipe Perez' phone conversation with his friend, Alejandra Ura, "Mitsui's" conversation with Jorge Ordonez, and the San Antonio facility conversation between Felipe Erispe and Juan Gutierrez. Perez' conversation with Ura is explained in terms of Perez' concern that Ura was falsely spreading the rumor that the Company would close if the Union was voted in. Perez testified that his concern was to "protect" Ura from the possible consequences of Ura's spreading false information. However characterized, this is not the kind of "aggravated" conduct by a third party (the capacity in which Perez acted) which must be proved as basis for a valid objection. The criteria for analysis articulated by *The Lamar Company and Westwood Horizons* absolutely foreclose a finding that objectionable conduct

occurred. Any threat attributable to Perez was at most ambiguous, as much a product of Ura's imagination as what was said. The perceived threat was not directed toward the entire unit—rather only to Ura's statements that the Company would close if the Union came in. There is no indication that the perceived threat was widely disseminated, and it was not likely that Perez would effect harm to Ura—he was Ura's friend. Finally, the conversation occurred distant from the election and was not rejuvenated. Much of the same analysis applies to the other two incidents involving Mitsui and Ordonez (Mitsui clearly had no capacity to carry out his alleged threat) and that involving Erispe and Gutierrez (again, Erispe had no apparent capacity to effect the threat—he was just talking). Finally, the "rumors" that those who voted for the Union would lose their jobs were utterly unattributed—as likely started by Con-Way or Con-Way supporters as by Union supporters. But the point is, these "rumors" present the classic example of a "threat" which could not reasonably be carried out—the Union had no capacity to discharge employees who supported the Company.

In its sum, Con-Way's evidence of "threats" is utterly without substance, both in terms of proven facts and applicable law. This Objection must be overruled.

Objection 9: Claim that the Union Told Employees it Would Know How They Voted.

In reviewing the record, we find no credible, specific evidence to discuss on this point. This Objection should have been withdrawn, and must be overruled.

Objection 10: Claim that the Union Through Its Agents Intimidated and Coerced Employees by Damaging or Vandalizing the Vehicles of Known Company Supporters.

Were there even a shred of evidence of threat of damage to the vehicles of Company supporters, or that Union supporters had played a role in such damage, we would discuss again the law enunciated in *The Lamar Company, supra, Cal-West Periodicals, supra, Westwood Horizons, supra.* There is no such evidence. In this factual context, other long-standing case law applies and governs.

In *N.L.R.B. v. Bostik Division, USM Corporation, 517 F. 2d 971 (6th Cir. 1975)* the Sixth Circuit considered an election case in which Union supporters had made isolated threats, and where unattributed property damage had occurred to vehicles of anti-Union employees and company vehicles. In relevant part, the Court wrote:

> There were also four occasions when anti-union employees sustained damage to their personal automobiles. Employee Edelman found one of the tires on his car cut while parked on the company lot. The flat was caused by "a nice clean cut" and the tire could not be repaired. Approximately a week prior to the election, employee Neil's truck, which had been parked overnight about two blocks from the plant, sustained damage when the fan went through the radiator about a mile and a half from where the truck started. A few days before the election, employee Frierson found a cut on a tire of his car parked in the company lot. About the same time, employee Skaggs testified, that the hood of his car had apparently been kicked in while parked at the plant.
>
> As recognized by the hearing officer, there was no substantial evidence that the above damage to the vehicles was intentional or that, if caused by vandalism, it was caused by Union adherents. In none of the incidents did the owner of the car establish a casual connection with the Union campaign. There is testimony that when the damage

was called to its attention, the Union expressed displeasure over such actions rather than making threats that more of the same kind of conduct was in store for those not supporting the Union. Given the time span over which the occurrences took place, it cannot be said that the four instances contributed to a general state of fear or anxiety. On the contrary, there is testimony to the effect that such incidents only confirmed the opinion of employee Skaggs that he did not want the Union to win the election. It is well settled that "[p]roperty destruction of a somewhat minor nature" which is "wrought on the cars of employees who [are] against the cause" is not a sufficient basis to set aside the findings of the Board if there is no evidence that "any of these incidents prevented any of the employees from voting their free choice." *Matlock Truck Body and Trailer Corp. v. N.L.R.B.,* 495 F.2d 671, 673-74 (6th Cir.), *cert. denied*, 419 U.S. 964, 95 S.Ct. 224, 42 L.Ed.2d 178 (1974).

There is also evidence of four instances of tampering with company equipment in the month preceding the election. On or about June 28, 1972, and again on July 14, 1972, the distributor wires on a forklift were switched, causing down time and requiring maintenance of the forklift. On July 12, 1972, the main switch on a glue slug line was turned off during a screen change, causing about a half-hour of down time. On August 3, the day of the election, the distributor wires on the forklift were cut and towels were discovered on the forklift manifold which, if they had gone undetected, might have caused a fire. As in the case of damage to personal automobiles, we agree with the finding of the hearing officer that the occurrences were not shown to have been other than the result of accident or inadvertence. In any event, no link to the Union campaign was established and there is no error in the finding that the incidents did not contribute to a pervading coercive atmosphere. 517 F.2d at 974.

The recited *Bostik* rationale was applied to the same result in *ATR Wire and Cable Co., 267 NLRB 204 (1983).* This legal rationale controls analysis and resolution of this Objection.

The record before the Hearing Officer contains the testimony of five admittedly anti-Union, pro-Con-Way employees claiming that their vehicles (and in one case a company vehicle) had suffered minor damage (scratches, nails or other materials in tires, liquid dousing, missing hose seals), and other anecdotal hearsay to the effect that a limited number of other employees had suffered vehicle damage. (R. 444-46; 490-92; 536-40; 588-89; 593-94). It appears that circulation of the claims of damage was basically limited to the alleged victims, their immediate supervisors, and a few other employees. (R. 448-50; 490-95; 541; 588; 604-05). As noted, there is no evidence tying this alleged damage to the Union or its supporters. Javier Moreno explicitly testified that identified Union supporters had never discussed or participated in conduct of this nature. (R. 800-03), The claims of damage are completely undocumented: there are no pictures, no reports, no other recordation of the damage. There was no police involvement, no investigation, no other process that would have verified the fact, nature, or extent of the claims. The Union, and its employee supporters, were never put on notice of the damage (R. 721) and there can be no claim of failure to investigate or explain on the part of the Union, and no claim of Union ratification, condonation, or adoption. Finally, there is not a shred of testimony reflecting that any anti-Union employee changed his or her vote as a result of the alleged damage. Rather, it can fairly be inferred that the damage, if it occurred, simply hardened the anti-Union sentiments of the purported victims and those of their friends who were told of the

damage. Put in simplest terms, the sole beneficiary of the purported damage was Con-Way, provided with the grist for yet another Objection to the election that it lost.

Summary:

In the context of recited case law, the complete absence of evidence tying Union supporters to the alleged damage, and of any evidence that the damage caused any election unit voter to change his or her vote require that this Objection be overruled.

Objection 11: Claim That Union Supporters Formed a "Gauntlet" Intimidating Other Voters.

This objection is apparently predicated on cases such as *Pepsi Cola Bottling Co.,* 291 NLRB 578 (1988) and *E. A. Nord Co.,* 276 NLRB 1426 (1985), cases in which Union supporters formed parallel lines or crowds through which voters were required to walk to cast their votes, and engaged in boisterous, challenging conduct as employees walked through to approach the voting area. There is no proof of such conduct here, so that the "gauntlet" analogy and related case law do not pertain.

Here, for a relatively limited period of time (from roughly 8 a.m. to 9 a.m.) a small group of Union supporters (variously Juan Narron, Francisco Maldonado, Antonio Cruz, Javier Moreno, Julio Ortega, and perhaps a couple of others) sat in the far back of the break room, as far away from the voting area as could be managed in the context of the applicable logistics, and made no attempt to communicate with voters as they passed on the far side of the break room towards the training room voting area. (*E.g.,* R. 307-08; 543-47; 648-50; Co. Ex. 7b). While some pro-Company, anti-Union voters (Hector Menchaca in particular) objected to the presence of Union supporters in the break room, there is no evidence that any Union supporters physically approached Menchaca or

anyone else, directed any commentary toward them, or otherwise engaged in conduct which would approximate the "gauntlet" condition or implicate related legal considerations.

Summary.

The "uncomfortable" feelings expressed by Mechaca and others based on the presence of Union supporters in the break room during the election hours are not legally relevant. As repeatedly noted, "the subjective reactions of employees are irrelevant to the question of whether there was, in fact, objectionable conduct." *Corner Furniture Discount Center*, *supra* at 1123; *Picoma Industries, Inc., supra* at 499. In a similar vein, "a certain measure of bad feeling and even hostile behavior is probably inevitable in a hotly-contested election." *Cal-West Periodicals, supra* at 600, citing *Nabisco, Inc. v. NLRB,* 738 F. 2d 955, 957 (8th Cir 1984). The discomfort of anti--Union employees in the removed presence of a small, detached, silent group of Union supporters does not implicate the "gauntlet" theory of Board case law.

This Objection has no merit in record evidence, and must be overruled.

Objection 13: Claim that Union Supporters' Conduct Made Voters so Fearful of Voting Their Conscience that They (the Voters) Intentionally Voided Their Ballots.

The sole evidence supporting this objection is in the testimony of Union supporter Anthony Cruz, who testified that employee Andres Ramos, a Jehovah's Witness, told Cruz that "he was going to cross out both votes because his vote didn't count because he doesn't vote because of his religion." (R. 84). Cruz testified that "when I invited him (Mr. Ramos) to support us with his vote in the very beginning he told me he couldn't vote for or against, but that he would help us out in that way, by voting with the two Xs,

because in that way he was helping us out." (R. 85). Finally, Cruz said "after a few days he told me I did what I told you I was going to do and my vote didn't affect." (R. 85). There is no evidence that Cruz or anyone else threatened, restrained, or coerced Ramos in any respect, or that Ramos acted out of fear when he voted for both the Union and Company, and thus voided his ballot. Again, in any event Mr. Ramos' objective reactions to the Union campaign and the circumstance in which he found himself "are irrelevant." *Corner Furniture Discount Center, supra* at 1123; *Picoma Industries, supra* at 499.

Summary:

There is no factual or legal support for this Objection, and it must be overruled.

Objections 12, 14, and 15: Conclusionary Catchalls.

In its Objections numbered 12, 14, and 15, Con-Way makes conclusionary, catchall allegations that the election was infected with an atmosphere of fear, intimidation, threats, and coercion, that laboratory conditions were destroyed, and that employees were not able to vote their "free choice."

These claims, beginning to end, have been specifically addressed above. As shown and discussed there, Con-Way has not presented evidence which, under applicable legal standards, can justify setting aside the election Con-Way lost. A detailed rehash serves no purpose. We simply note that: (1) no misconduct by the Union, its officers, agents, and representatives has been shown, (2) that no meaningful conduct by Union supporters "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible" has been proved; and (3) there is no

evidence that the totality of the alleged conduct and related atmosphere changed the vote of a single election unit employee.

As with each and all of the previously-discussed Objections, these final three are without merit and must be overruled.

VIII. CONCLUSION

Nothing more remains to be said. Con-Way's Exceptions and the related argument raised in Con-Way's Brief in Support of its Exceptions should be overruled in their entirety. The Hearing Officer's Report should be adopted in its entirety, and a Certification of Representative issued based on the September 12, 2014 election in this case.

Respectfully submitted,

/s/ G. William Baab
G. William Baab
BAAB & DENISON, L.L.P.
6301 Gaston Avenue, Suite 550
Dallas, Texas 75214
214.637.0750 Telephone
214.637.0730 Facsimile
gwbaab@baabdenison.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on the 14th day of April, 2015, the foregoing pleading was filed via electronic filing with:

Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

and served via e-mail and United Parcel Service upon:

Daniel J. Michalski, Hearing Officer
National Labor Relations Board, Region 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, Colorado 80294
Dan.Michalski@nlrb.gov

Martha Kinard, Regional Director
National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Ft. Worth, TX 76102-6107
martha.kinard@nlrb.gov

Jonathan Kaplan, Esq.
LITTLER MENDELSON P. C.
3725 Champion Hills Drive, Suite 3000
Memphis, Tennessee 38125-0500
jkaplan@littler.com

/s/ G. William Baab
G. William Baab